



Native American Graves Protection and Repatriation Act

BACKGROUND: Native Americans have raised strong concerns about the desecration of their human remains and the ownership of cultural items and other sensitive items. Indian Tribes, Native Hawaiian Organizations, and Native American individuals have repeatedly requested the return or "repatriation" of these human remains and sensitive cultural items. Consequently, representatives of museums, scientific organizations, Indian tribes, and Native Hawaiian organizations began to discuss how a better understanding of Native American historic and contemporary cultural values could be developed at the national level. Discussions emphasized the importance of treating human remains and sensitive cultural items at all times with dignity and respect, recognized the need to identify and return these funerary or sacred items and cultural patrimony in museological collections, and stressed the important role that museums play in educating the public and in increasing social awareness about prehistory and history. The topics identified through these discussions were presented in hearings before the House Committee on Interior and Insular Affairs and the Senate Select Committee and in a number of committee reports. Strong legislative interest during the 101st congress resulted in the introduction of a number of bills dealing with the protection and repatriation of Native American human remains and cultural items. Many of these legislative initiatives are reflected in the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990.

STATUTE: Native American Graves Protection and Repatriation Act (NAGPRA). Public Law 101-601.

REGULATIONS: Pending.

- REFERENCES:**
1. U.S. Department of Energy, Office of Environmental Guidance, DOE 5400.1, *General Environmental Protection Program*.
 2. U.S. Department of Energy, Office of Congressional and Intergovernmental Affairs, DOE 1230.2, *American Indian Tribal Policy*, April 1992.
 3. U.S. Department of Energy, Office of Environmental Guidance Memorandum, "Management of Cultural Resources at Department of Energy Facilities," February 1992.
 4. U.S. Department of Energy, Office of Environmental Guidance Memorandum, "Native American Graves Protection and Repatriation Act," July 1992.
 5. U.S. Department of Energy, Office of Environmental Guidance, The Environmental Guidance Program Reference Book: *The National Historic Preservation Act and Related Legislation*, ORNL/M-1178, Oak Ridge National Laboratory, Oak Ridge, Tennessee.
 6. U.S. Department of Interior, National Park Service, Technical Brief No. 11, *Legal Background of Archaeological Resources Protection*, June 1991.
 7. U.S. Department of Interior, National Park Service, *Preliminary Interpretation of Native American Graves Protection and Repatriation Act*, November 1991.
 8. U.S. Department of Interior, National Park Service, *Archaeological Resource Protection*, Preservation Press, Washington, D.C., 1992.

NAGPRA contains provisions for the repatriation of human remains and cultural items

NAGPRA, enacted on Nov. 16, 1990, establishes a means for American Indians, including members of Indian Tribes, Native Hawaiian organizations, and Native Alaskan villages and corporations to request the return or “repatriation” of human remains and other cultural items presently held by Federal agencies or Federally assisted museums or institutions. NAGPRA also sets forth provisions regarding:

- ☐ the intentional excavation and removal,
- ☐ inadvertent discovery, and
- ☐ illegal trafficking of Native American human remains and cultural items.

Primary participants responsible for implementing NAGPRA

The primary participants responsible for implementing this statute, as defined in *Section 2* of NAGPRA, include:

- ☐ Federal Agencies,
- ☐ all institutions and museums receiving Federal funds,
- ☐ Indian tribes, and
- ☐ Native Hawaiian organizations.

Cultural items protected by NAGPRA

Section 2 of NAGPRA identifies five types of cultural items protected under this statute and provides a contextual definition for each type:

- ☐ human remains;
- ☐ associated funerary objects: “objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum;”
- ☐ unassociated funerary objects: “objects that, as a part of the death rite or ceremony

of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe;”

- ☐ sacred objects: “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents;” and
- ☐ cultural patrimony: “an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself.”

Definition of cultural affiliation

Cultural affiliation, the key concept for implementing this statute, is defined in *Section 2* as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.”

Responsibilities of Federal Agencies

All Federal agencies that manage land and/or are responsible for archaeological collections from their lands or generated by their activities must comply with the Native American Graves Protection and Repatriation Act. Federal agencies are responsible for:

- ☐ producing inventories and written summaries of cultural items in their collections or controlled by them, informing lineal descendants, Indian Tribes and Native Hawaiian organizations that may be affiliated with these items in their holdings, and working with Native American groups identified during the summary and inventory processes; and

- ❑ consulting with Tribes or Native Hawaiian organizations when planned archaeological excavations may encounter cultural items or when cultural items are discovered inadvertently on Federal or Tribal lands. Federal agencies are responsible for the inventory, summary, and potential disposition of cultural items recovered from lands under their jurisdiction, even though the items are held in non-Federal repositories.

Federal agencies must return human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony

The standard of Repatriation, as described in *Section 7* of NAGPRA, may apply to some DOE activities. Human remains and associated funerary objects must be expeditiously returned to the lineal descendants or affiliated Indian Tribe or Native Hawaiian organization if requested when:

- ❑ the cultural affiliation of the material with the requesting individual, Tribe or Native Hawaiian organization has been established by the museum or Federal agency as part of its summary and inventory process, or
- ❑ cultural affiliation has been proven by a preponderance of the evidence to be with the requesting party, the material must be expeditiously returned to the lineal descendants of the Indian Tribe or Native Hawaiian organizations if requested. In the event that research essential to the national interest is being conducted on such materials, return can be delayed until 90 days after the research has been completed.

Federal agencies and museums are also required to repatriate unassociated funerary objects, sacred objects, and objects of cultural patrimony when the claimant can demonstrate all of the following:

- ❑ the objects conform to the definition of an unassociated funerary object, sacred object, or object of cultural patrimony;

- ❑ cultural affiliation exists for these kinds of items;
- ❑ sacred objects and objects of cultural patrimony were in the claimant's ownership or control; and
- ❑ evidence presented by the claimant exists which, if standing alone before the introduction of evidence to the contrary, would support a finding that the agency or museum did not have the right of possession to such object unless it can overcome such inference and prove that it has a right of possession to the objects.

Once these four issues are satisfied, the Federal agency or museum must return the object if it agrees both that the object is properly classified and that the Federal agency or museum has no right of possession.

If agencies or museums disagree with the claimant regarding the classification of the object as a cultural item under the Act or have evidence that conveys to them the right of possession, no return is required. Disputes can be resolved with the help of the Review Committee established under NAGPRA or in Federal court.

Establishment of Native American ownership to cultural items excavated or discovered after 1991

Section 3 of NAGPRA addresses how to establish Native American ownership of cultural items obtained during planned excavations or unanticipated discoveries that occur on Federal lands after November 16, 1990. Ownership will be determined by the following priority order: lineal descendants, tribal landowners, culturally affiliated Indian Tribes and Native Hawaiian organizations and descendants of the area's aboriginal occupants.

Inadvertent discoveries on Federal and Indian lands

DOE managers of ground-disturbing activities on Federal and Tribal lands should be aware of the statutory provisions for the treatment of inadvertent discoveries of Native

American remains and cultural objects.

Section 3 of the Act requires that:

- ❑ activity in the area of the discovery cease immediately,
- ❑ a reasonable effort be made to protect the items discovered,
- ❑ notice of the discovery be given to the agency head or the appropriate Indian Tribe or Native Hawaiian organization, and
- ❑ a 30-day delay period following official certification that notification of the accidental discovery has been received by the agency or tribe.

This provision is intended to provide a process where Indian Tribes and Native Hawaiian organizations have an opportunity to intervene in the developmental activity on Federal or Tribal lands to safeguard human remains and objects and to make a determination as to the appropriate disposition of these items.

Resolutions of disputes

A Review Committee is established by **Section 8** of NAGPRA. It is an advisory committee that makes recommendations to the Secretary of the Interior. Committee membership is stated explicitly in the Act. The seven member Committee is appointed by the Secretary of the Interior for monitoring the inventory and identification process and repatriation activities mandated under **Sections 5, 6** and **7**. This committee will also function to resolve disputes relating to the return of items and compile an inventory of culturally unidentifiable human remains in the possession or control of each Federal agency and museum and recommend specific actions for developing a process for disposition of these remains.

Penalties for non-compliance

There are two situations specified under NAGPRA that will result in punitive actions. NAGPRA allows civil penalties to be assessed by the Secretary of the Interior on any museum which fails to comply with the requirements of this Act as provided under **Section 9**. Individuals who engage in illegal

trafficking (such as the sale, purchase, use for profit, or transport for sale or profit) of Native American human remains and/or cultural items may be fined or imprisoned in accordance with Chapter 53 of Title 18, United States Code.

Other provisions of interest to DOE

Other NAGPRA provisions that may be applicable to DOE facilities and programs include:

- ❑ **Section 10. Grants** provides grants to Indian tribes, Native Hawaiian organizations and museums for the purpose of fulfilling various requirements of the Act,
- ❑ **Section 12. Special Relationships Between Federal Government and Indian Tribes** acknowledges a unique relationship between these parties,
- ❑ **Section 13. Regulations** provides for the development of regulations for the implementation of this Act. These regulations will specify technical procedures for implementing the sections discussed under this statute, and
- ❑ **Section 15. Enforcement** authorizes the U.S. district courts to enforce the provisions of this Act.

Questions of policy or questions requiring policy decisions will not be dealt with in EH-232 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning the subject material covered in this Information Brief to Lois Thompson, Federal Preservation Officer, Office of Environmental Policy and Assistance, Department of Energy, EH-412, 1000 Independence Ave., S.W., Washington, D.C. 20585, telephone (202) 586-9581.